THE LEGALITY OF CONTRACTS OF SALE WHICH PROHIBIT THE PURCHASER-RETAILER FROM HANDLING GOODS OF THE WHOLESALER'S COMPETITORS. — At common law a restraint on trade was lawful only if it was both reasonable and partial in its effect.[1] At the close of the nineteenth century the English courts made the reasonableness of the restraint the sole test of its legality.[2] In the United States the Sherman law, at first thought to prohibit even reasonable restraints,[3] was in 1911 construed to be no different from the later common law. Since under either the test of a restraint's legality is its reasonableness in view of all the circumstances of the particular case, it is apparent that no rule can be formulated as to the lawfulness of contracts of sale in which the purchaser agrees to buy from no competitor of the seller's.[4] In recent years, to insert such a provision in their contracts of sale has become the settled policy of many wholesalers. It is, like the price-maintenance proviso with which it is so often found,[5] an attempt by the seller to limit competition (though here a different sort of competition) in the retailing of his goods. It is another phase of the modern wholesaler's endeavor to take into his own hands control of the whole process of distribution, in order to protect himself against inefficient, unscrupulous, or unenthusiastic retailers. Such a contract assures the seller of whole-hearted "pushing" of his goods by the retailer, while at the same time it effectually limits the field in which the wholesaler must meet the competition of his rivals. It is interesting to compare development in this field of distribution with human actions in the case of buying and selling of labor. In the latter, courts have differed as to the right to conscript neutrals; here the wholesalers in their competition among themselves seek to enlist the aid of retailers. Whether this conduct is permissible depends on whether the aims of the wholesalers are founded on the legitimate demands of their business and outweigh the sacrifices the community must make to give them rein. Such contracts have in the past usually been held valid at common law,[6] as well as under the Sherman law.[7]

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[1] See MATTHEWS AND ADLER, RESTRAINT OF TRADE, 2 ed., 38, 39. The commonest examples of partial restraints are restraints limited in time or in locality. *Cf.* the cases in note 15.

[2] Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Co., [1894] A. C. 535. See the criticism of this case in MATTHEWS AND ADLER, *supra*. For an Australian view of the change in economic policy indicated by this decision, see B. A. Ross, "Freedom of Trade," 5 COMMONW. L. REV. 241.

[3] See Augustine L. Humes, "The Power of Congress over Combinations," 17 HARV. L. REV. 83, 87.

[4] But *cf.* Roland R. Foulke, "Restraints on Trade," 12 COL. L. REV. 87, 132. Mr. Foulke overlooks the fact that a combination is none the less a combination if made up of an individual seller and an individual buyer, than if made up of a group of sellers and a group of buyers.

[5] Many of these cases deal also with the subject of price maintenance. For a consideration of price maintenance at common law and under proposed legislation, see 30 HARV. L. REV. 68.

[6] Brown *v.* Rounsavell, 78 Ill. 589 (1875) (sale of machines); Peerless Pattern Co. *v.* Gauntlett Dry Goods Co., 171 Mich. 158, 136 N. W. 1113 (1912) (patterns); J. W. Ripy & Son *v.* Art Wall Paper Mills, 41 Okl. 20, 136 Pac. 1080 (1913) (wall paper); Joseph Schlitz Brewing Co. *v.* Travi, 179 Ill. App. 269 (1913) (beer). But *cf.* Purington *v.* Hinchcliff, 219 Ill. 159, 76 N. E. 47 (1905) (bricks).

[7] See W. T. Rawleigh Medical Co. *v.* Osborne, 158 N. W. 566, 568 (Ia.) (1916) (drugs); Pictorial Review Co. *v.* New Model Dry Goods Co., 185 S. W. 1199 (Mo.

Recently contracts of this type have been assailed [8] as a violation of the state laws against trade restraint, and the attack thus far seems to have been fairly successful.[9] Most of the state statutes follow the Sherman law, but in at least three [10] states statutes have explicitly made contracts of this kind unlawful. The language of the latter is somewhat similar to that of section 3 of the Clayton law.[11] This act, however, prohibits such sales (and leases) only in the event that their effect "may be to substantially lessen competition or tend to create a monopoly in any line of business." [12] Upon the construction of the word "substantially," of course, depends the whole vitality of this section of the Clayton law.

App.) (1916) (patterns). *Cf.* the curious case of Continental Wall Paper Co. *v.* Voigt & Sons Co., 212 U. S. 227 (1909) (wall paper).

[8] This assault is undoubtedly due (*a*) to the tremendous increase in contracts of this nature and (*b*) to the widespread publicity given to the provisions of the recent Clayton law concerning such contracts. It may be observed that identical contracts of the same wholesaler have been simultaneously attacked in different states more than once.

[9] Massachusetts: REV. L. MASS., 1902, c. 56, § 1, prohibiting such contracts, is absurdly construed to mean nothing, in Butterick Pub. Co. *v.* Fisher, 203 Mass. 122, 89 N. E. 189 (1909) (patterns).

North Carolina: N. C. PUB. LAWS, 1911, c. 167, § 1, subsec. *a*, is enforced, and the contract held void, in Standard Fashion Co. *v.* Grant, 165 N. C. 453, 81 S. E. 606 (1914) (patterns).

South Dakota: LAWS OF 1909, c. 224, was held not to prohibit the contract in Sullivan *v.* Rime, 35 S. D. 75, 150 N. W. 556 (1915) (patterns.)

Wisconsin: STAT. WIS., § 1747 *e*, held not to prohibit the contract, since only a partial restraint was imposed, in Sullivan *v.* Rose, 158 Wis. 414, 149 N. W. 158 (1914) (beer).

Texas: In Texas such contracts are now expressly made illegal by arts. 7796, 7798, and 7807 of TEX. CIV. STAT. Under an earlier and less specific statute a contract of this nature was held illegal. Simmons *v.* Terry, 79 S. W. 1103 (Tex. Civ. App.) (1904) (gloves). Recent cases holding such contracts unlawful are Segal *v.* McCall Co., 184 S. W. 188 (Tex.) (1916) (patterns); W. T. Rawleigh Medical Co. *v.* Fitzpatrick, 184 S. W. 549 (Tex. Civ. App.) (1916) (drugs); Pictorial Review Co. *v.* Pate Bros., 185 S. W. 309 (Tex. Civ. App.) (1916) (patterns); T. W. Rawleigh Medical Co. *v.* Gunn, 186 S. W. 385 (Tex. Civ. App.) (1916) (drugs); Wood *v.* Texas Ice and Cold Storage Co., 171 S. W. 497 (Tex. Civ. App.) (1914) (ice); Carroll *v.* Evansville Brewing Ass'n, 179 S. W. 1099 (Tex. Civ. App.) (1915) (beer). In Celli *v.* Galveston Brewing Co., 186 S. W. 278 (Tex. Civ. App.) (1916), the court held that the statute was not intended to restrict a landlord in the use of his premises, and that accordingly it did not apply to a brewery which leased its saloon to a "retailer" who contracted to sell the lessor's beer exclusively. It is submitted that whether the contract is or is not a part of a lease or conveyance of realty, is entirely immaterial.

[10] Massachusetts, North Carolina, and Texas.

[11] 38 STAT. 730. This section reads: Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

[12] In the first prosecution under this section, leases of patented machinery with restrictions on purchase from the lessor's competitors, which had been held lawful under the Sherman law, were held to be within the inhibition of this section. United States *v.* United Shoe Machinery Co., 234 Fed. 127 (1916).

Since a number of specific prohibitions are made, it may be that the courts will construe it as at least an advance upon the Sherman law. To do that, however, they would have to hold that "substantially" in the Clayton law means less than "unreasonably" in their construction of the Sherman law. But, unless that is done, the Clayton law, like its predecessor, will be no more than an enactment of the common law.[13]

The legality of contracts of sale [14] which contain a stipulation that the buyer shall not handle a competitor's goods is, then, to be determined in general [15] by the reasonableness of the restraint thus imposed. That the contracts impose a restraint on trade is clear. That the restraint may be a serious danger to the community is equally clear, for it is easily possible for a wholesaler, by an extensive system of such contracts, to close to all competitors the markets of a community or even of a state.[16] Theoretically new retailers would then set up, but the inertia that would have to be overcome renders that mode of relief a most uncertain one. By this monopoly the public necessarily suffers to at least as great a degree as the wholesaler benefits.[17] Against this consideration must be weighed only the wholesaler's contention that such contracts are necessary in order to insure a proper distribution of his goods. What constitutes a reasonable restraint is, of course, a question of fact for the court in each case; but that many of the contracts with "tying" clauses are an unreasonable restraint and a substantial lessening of competition, seems an unescapable conclusion. What is "reasonableness," however, must inevitably depend upon the economic views of our courts, which are based upon the expressed policy of Congress, and, sometimes to a greater degree, upon the desires and needs of business, expressed or unexpressed.

[13] That contracts of this sort, where the wholesaler and the retailer are in different states, are interstate commerce, and hence to be governed by the Sherman and Clayton laws, is admitted by the Texas courts in the cases in note 9. But they then proceed to apply the law of Texas, upon the theory that part of the contract — the resale of the goods by the retailer — is to be performed wholly in Texas. See especially Segal *v.* McCall Co., *supra*. It can hardly be doubted that such transactions are interstate commerce, subject to the federal laws, and there is little to support the Texas theory that as regards enforcement they are subject to the state law also. In most cases, in fact, the retailer neither expressly nor impliedly contracts to resell the goods within the state. Even if he did so contract, the application of the state law to other portions of the contract is hardly warranted. Nor does the fact that the prohibited purchase from a competitor may be an intrastate transaction amount to such a warrant. But nevertheless in Peerless Pattern Co. *v.* Gauntlett Dry Goods Co., and J. W. Ripy & Sons *v.* Art Wall Paper Mills, *supra*, also, common law (*i. e.*, state law) was applied to transactions which were really interstate commerce. But *cf.* J. B. Watkins Medical Co. *v.* Holloway, 182 Mo. App. 140, 168 S. W. 290, where the correct view is taken. It should be remembered that Congress has power to regulate purely intrastate business, under certain conditions. See Gibbons *v.* Ogden, 9 Wheat. 1, 204.

[14] It should be noticed that the restraint is valid if attached to a contract of agency, in which the goods are sent to the retailer on consignment. Cole Motor Car Co. *v.* Hurst, 228 Fed. 280 (1915) (motor cars).

[15] Some state courts hold the contracts legal because the restraint which they impose is only a partial one. J. W. Ripy & Sons Co. *v.* Art Wall Paper Mills; Sullivan *v.* Rose, *supra*.

[16] In reading these cases one is struck by the fact that so many of them involve identical contracts of the same wholesaler and also of the same industry. Especially in the pattern business are these contracts in fashion.

[17] Unless such contracts did "substantially lessen competition," they would hardly be made to the extent that they are now, in so many different industries — ice, beer, patterns, wall paper, gloves, drugs, machinery, motor cars, and bricks.

The policy of our government is at present expressed inconsistently as well as incoherently.[18] And that business in general desires the lawfulness of such contracts as these seems doubtful in the extreme.

IS LEGISLATIVE ABOLITION OF THE INJUNCTIVE REMEDY IN LABOR DISPUTES UNCONSTITUTIONAL? — A recent Massachusetts case is a curious commentary on the practical effects of the Newtonian theory of gravitation as applied to government. The defendants, members of a trade union desirous of forcing the plaintiffs, members of a rival organization, to join their number, brought pressure on the latter's employers to compel them to discharge the plaintiffs. A statute provided that no injunction should be granted in any case between employers and employees, or between persons employed and persons seeking employment, unless necessary to prevent irreparable injury to property, and that for this purpose the right to enter into the relation of employer and employee should not be a property right.[1] Disregarding this statute as violative of the Fourteenth Amendment of the Constitution of the United States the court granted the plaintiff's prayer for an injunction. *Bogni* v. *Perotti*, 203 Mass. 26, 112 N. E. 853.

In the first place not much sympathy can be expressed with the technique of the legislation here in question. It involves two assumptions of a highly questionable character: first, that equity will interfere only when the right threatened is a right of property; second, that what was property can cease to be so by legislative fiat. The suggestion of an intent to outflank the Fourteenth Amendment is not a good character for an act to carry on its face. "No statute is a good risk which invites cautious judges to hamstring it."[2] The plain purpose of the act, however, and the result in fact of all its language is to prevent the use of injunctions in labor difficulties where no violence or injury to tangible property is threatened. The court by its decision must deny the validity of this purpose and result as well as the assumptions of the accompanying language.

The court argues that the right to dispose of one's labor free from the sort of interference here practiced is a property right which the legislature cannot despoil by removing it from the scope of the only effective remedy provided by the law for the specific protection of property. Such action, the court asserts, is to discriminate between this right and

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[18] For a lucid enumeration of the five economic policies open to us, see Henry R. Seager, "The New Anti-trust Acts," 30 POL. SCI. Q. 448. The first — *laissez faire* — can be of only academic interest now. The others are, in order, enforced competition, (which the first interpretation of the Sherman law expressed), regulated competition (the Sherman law at present), regulated combination, and government ownership. The Clayton law is apparently based upon a jumbling of the second and the third of these policies.

For a statement of the economic policy back of the Sherman law, see M. S. Hottesheim, "The Sherman Anti-trust Law," 44 AM. L. REV. 827, 852. *Cf.* B. A. Ross, "Freedom of Trade," *supra*, at 240.

[1] MASS. ACTS 1914, c. 778.

[2] John M. Maguire, "State Liability for Tort," *supra*, p. 36.